FARAD CONTINUATION SHEET

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 260 OF 1988

Vasudeo Vithal Relekar, age 37)
occupation-Agriculture)
Residing at Shelgaon)
Taluka-Barshi, District-Solapur) .. Appellant/
Defendant no.1

v/s.

1. Arun Sidhayya Jangam)
(Gajabhar), Age 36)
Occupation-NIL)

2. Shivram Limbaji Kulal, since)
deceased by his heirs and)
legal representatives)

2A. Gangabai Shivram Kulal,)
Age 40, Occ- Agriculture)

2B. Vinayak Shivram Kulal,)
Age 23, Occ-Agriculture)

2C. Kamal Ramling Kumbhar,)
Age-28, Occ- Household)
All residing at Shelgaon (R)
Taluka-Barshi, Dist-Solapur) .. Respondents/
(Orig. Plffs 2 & 3)

Ms. A.R.S. Baxi, for the Appellant.
Shri A.A. Kumbhakoni for Respondent nos. 2A to 2C.

CORAM: A.S. OKA, J.
DATE : 17th August, 2004.

ORAL JUDGEMENT.:-

1. On 19th February, 1988 this court admitted the Second Appeal by observing that ground numbers 1 to 3 and 5 to 7

raise substantial questions of law. The said grounds read thus :

1. Is the Court below correct in holding that as the law then in force it was necessary to have the permission under the Bombay Prevention of Fragmentation and Consolidation of Land Act and as there was no permission the contract became void ? The Court below has failed to consider that no such permission was necessary under the said Act as the land was not allotted as contemplated by the said Act. Further, the learned Judge has failed to appreciate the ratio of 1980 Maharashtra Law Journal, page 547 ?

2. It is further submitted that no such permission was necessary in view of the Amendment as the sale was to be made to an Agriculturist. It is submitted that the said amendment was applicable to the present transaction as it was retrospective in operation. It is submitted that the Court below has erred in holding that in view of Section 31 as then in force such permission was necessary ?

3. It is further submitted that infact permission was obtained and it is submitted that it was irrelevant whether it was obtained by Respondent no.2 or by the Appellant, the permission is not to a particular person but to sell the land ?

5. Is the Court below correct in holding that provisions of Section 32 of the Contract Act are attracted to the present contract and the contract was a contingent one depending upon obtaining the permission ?

6. Is the Court below correct in holding that the contract was conditional and as there was no permission under Section 31, it became void ?

7. Is the Court below correct in holding that the doctrine of discharge of contract by frustration is applicable in the present case as the permission was not obtained ? or to hold that performance became impossible as the event of getting did not take place?

2. I have heard the counsel appearing for the parties on the said substantial questions of law. The Appellant is the Defendant no.1. The Respondent no.1 is the original Plaintiff no. 2 and the Respondent no.2 is the Original Plaintiff no.3. The Original Plaintiffs filed a suit for perpetual injunction on 31st January, 1976 in respect of the suit land. The contention raised in the suit is that as loan was advanced by the Original Defendants to the Original Plaintiff No.1 and 2 an agreement for sale was executed by way of security for

repayment of loan. After institution of the suit, an amendment was carried out for incorporating an averment that during the pendency of the suit on 9th March, 1976 the Original Plaintiff no. 1 and 2 sold the suit property to the Original Plaintiff no.3 by a registered sale deed.

3. The Original defendants contested the suit by filing written statement. The case made out in the written statement is that on 5th November, 1974 an agreement for sale was executed by the Original Plantiffs No.1 and 2 in favour of defendant no.1 by which it was agreed to sell the suit property to the original Defendant no.1. A case is made out that total sum of Rs.2,300/- has been paid by the Defendant no.1 to the Plaintiffs no.1 and 2 by way of earnest money. It is stated that a joint application was made by the parties to the Assistant Collector, Solapur Division, Solapur for grant of permission for effecting sale. It is further stated that Defendant no.1 was ready and willing to perform his part of agreement. A contention is raised that Defendant no.1 was put in possession in under a separate possession receipt. A counter claim was made for specific performance of the said agreement for sale. The said counter claim was resisted by the Original Plaintiffs no. 1 and 2 by filing written statement.

4. It appears that the Plaintiff no.3 filed a pursis giving up his claim in the suit and therefore what was decided by the Trial court was only the counter claim.

5. The learned Trial Court held that the execution of the agreement in favour of Defendant no.1/Appellant has been established. The learned Judge also held that the case made out by the appellant as regards payment of earnest money is established. A finding was also recorded that the Appellant was ready and willing to perform his part of the agreement. However, the learned Trial Judge declined to grant relief of specific performance and directed payment of damages. The learned Trial Judge held that the application for sale permission made on the basis of agreement was rejected and therefore, the agreement being in contravention of the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings ACt, 1947 (hereinafter referred to as the said Act of 1947) was void. The learned Trial Judge held that the contract was contingent contract and as a result of refusal of the authorities to grant permission, specific performance cannot be granted.

6. An Appeal was preferred by the Appellant to the District Court. The learned Additional District Judge dismissed the Appeal. The learned Judge however upheld the contention of the Appellant that there was an agreement of sale executed in his favour and that he had established that he was ready and willing to perform his part of the agreement. During the pendency of the Appeal, the Original Plaintiff No.1 Bhagirathibai expired and therefore a contention was raised that the Appeal stands abated. The said contention was also

negatived by the Appellate Court. However decree for specific performance was refused on the ground that sale permission was refused by the Deputy Collector. He also held that the agreement was violative of section 31 of the said Act of 1947. Being aggrieved by the Judgments and decrees of the Courts below, the Appellant has preferred the Second Appeal.

7. The learned Counsel appearing for the Appellant relied upon the Judgment of this Court reported in 1980 MH.L.J. page 547 (Putalabai w/o. Lakhu Pawar and Ors. v. Shiva Dhondi Pawar & Ors) and submitted that bar under section 31 of the said Act of 1947 is attracted only if the sale is effected of land constituting an holding which is allotted under the said Act of 1947. She submitted that in the facts of the case, it is not established that the suit land was part of the holding allotted under the said Act of 1947. She relied upon the said Judgment of this court which also holds that the bar created by section 31 will not apply if transfer is to an agriculturist or an agricultural labourer. She submitted that the application for sale permission was refused as the Original Plaintiff no.1 and 2 themselves raised an objection to the grant of permission. She pointed out that, in any event, conditional decree directing the Respondent to obtain sale permission and directing execution of sale deed in case the permission was granted could have been passed. She submitted that though Plaintiff no.1 Bhagirathibai expired during the pendency of the Appeal, the Respondent no.2 herein, being her son was already on record in capacity as Respondent

no.2 and thus estate of Bhagrithabai was represented. She submitted that even on the basis of findings recorded by the courts below the Appellant was entitled to decree for specific performance.

8. Shri Kumbhakoni, learned counsel appearing for Respondent no.2(a) to 2(c) submitted that deceased Bhagirathibai had a daughter. As the said daughter was not impleaded as a party, a decree for specific performance cannot be passed. The said daughter was having an undivided share in the suit land and she was not a party to the proceedings. He submitted that though the Appeal may not have abated as one of the legal representatives of deceased Bhagirathibai was already on record, the daughter of Bhagirathibai was a necessary party and without impleading her, a decree for specific performance only as regards part of the suit land cannot be passed. The said daughter was having an undivided share in the suit land and was not a party to the proceedings. He submitted that the the Respondent no.2 purchased the suit land as he was under a bonafide impression that as permission for sale has been refused on the basis of agreement executed in favour of the Appellant, the said Agreement had become void. He lastly submitted that the Courts below have exercised discretion under section 20 of the Specific Relief Act, 1963 which cannot be interfered with under section 100 of the Code of Civil Procedure, 1908.

7. I have considered the rival submissions. The learned

Single Judge of this Court in the case of of Putalabai v. Shiva Dhondi (supra) held that "It will, therefore be seen that in order to attract the bar of this section, the holding must have been allotted under this Act. There is nothing in the instant case to show that the suit land was a holding allotted to the defendants under this Act. On the admitted facts the suit land cannot be a holding allotted under the Fragmentation Act to the defendants because Lakhu executed a sale deed of the suit land to the defendants privately. The provision of allotment is laid down in rule 11 of the Rules framed under the Fragmentation Act. So all these provisions clearly go to show that the suit land is not a holding allotted under this ACt and, therefore the bar under section 31 of the Fragmentation Act cannot be attracted. Both the Courts below have proceeded on the assumption that this section is applicable and both of them have not taken into consideration the wording used in the section and that is why both of them have fallen in error". The learned single judge further held that "it will therefore be seen that even if the land is a holding allotted under this Act, the provisions of sub section 3(iii) of section 31, make it clear that the bar will not apply if the transfer is to an agriculturist or agricultural labourer".

8. It is true that in the agreement, there was a reference to the permission being obtained from the authority. However, no case is made out by Respondent no.2 that the appellant was not an agriculturist. Infact in the plaint

filed by the Original Plaintiffs, the occupation of Appellant is shown as agriculture. No evidence is led to show that the suit land was forming a part of a holding which was allotted under the provisions of the said Act of 1947. Therefore, the ratio of the judgment of this Court in the case of Putalabai Lakhu Pawar is squarely applicable.

9. It is very clear that the application for permission was rejected only on account of the objection raised by the Original Plaintiffs nos. 1 and 2. Only because of the said objection, the application was rejected. Even assuming that permission under section 31 was required to be obtained, there is no bar in the provisions of the said Act of 1947 for making a fresh application for grant of permission. Therefore relief of specific performance could not have been denied only on the ground of refusal of the competent authority to grant sale permission.

10. The Respondent no.2 is the Original Plaintiff no.3 who purchased the suit land after the institution of the suit. It is necessary to refer to section 19 of the Specific Relief Act, 1963 and in particular Clause (b) thereof.

> "19. Relief against parties and persons claiming under them by subsequent title-Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the Contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. ....."

11. The Court can to enforce specific performance of a contract against any person claiming under a party to the contract by a title arising subsequent to the contract. Only exception is in case of transferee for value who has paid his money in good faith and without notice of the original contract. The Respondent no.2 has not made out any such case in the Trial Court. It is pertinent to note that a contention was raised in the Trial Court that Respondent no.2 purchased the suit land under a bonafide belief that the earlier contract had become void. From the said contention raised before the Trial Court, it is clear that it was not the case of Respondent no.2 that he was not aware of the earlier contract. The said contention raised by him shows that he was fully aware of the earlier contract. Therefore, the Respondent no.2 cannot claim to be a bonafide purchaser without notice of the contract between the Appellant and Original Plaintiff nos. 1 and 2. Therefore, a decree for specific performance can be passed against the Respondent no.2.

12. In the Appellate court, a contention was raised on behalf of Respondents that the the Appeal has abated as daughter of deceased Bhagirathibai was not brought on record. The argument in the Appellate Court was that there was an abatement of Appeal. No submission was made in the Appellate Court that as undivided share of daughter Bhaghirathibai was not represented, decree for specific performance could not have been passed. However, such contention has been raised for the first time in the second Appeal by learned Counsel appearing for Respondent no.2. I have, therefore, dealt with the said contention. In this connection it will be necessary to refer to the Judgment of the Apex Court reported in A.I.R. 1965 S.C. page 1049 (Daya Ram and Ors vs. Sundari and Ors). In paragraph 11 of the judgment the Apex Court quoted with approval a decision of Madras High Court reported in ILR 26 Madras page 230 (Kadir Mohideen v/s. Muthu Krishna). The Apex Court relied upon the following observation in the decision of Madras High Court " in case where the person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate....If this were not the law, it would, in no few cases, be practically impossible to secure a complete representation of a party dying pending a suit and it would be specially so in the case of Muhammadan party and there can be no hardship in a provision of law by which a

party dying during the pendency of a suit, is fully represented for the purpose of the suit, but only for that purpose, by a person whose name is entered on the record in place of the deceased party under Sections 365, 367 and 368 of the Civil Procedure Code, though such person may be only one of several legal representatives or may not be the true legal representative". The Apex Court further observed that "This, in our opinion, correctly represents the law."

13. After considering the law on the point the Apex Court in a Judgment reported in 1994 supp (3) SCC page 675 (Chaudhary Ram v/s. State of Haryana) held that the object of bringing legal representatives on record under Order 22 Rule 4 is to have the estate of the deceased represented. In the facts of the case before the Apex Court it ‘ was held that it was not necessary that all the legal representatives should necessarily be brought on record. In the facts of the case before the Apex Court, two sons and a daughter of deceased were already on record. The Apex Court held that the omission to bring other legal representatives namely the other sons and daughters was not fatal.

14. If paragraph 10 and 20 of the Judgement of the Appellate Court are perused the only contention raised by Respondent No.2 appears to be that as all the legal representatives of the deceased Bhagirathibai were not brought on record, the Appeal stands abated. It was not the contention of Respondent no.2 that the Original Plaintiff no.2

i.e the son of Bhagirathibai cannot alone represent the estate of Bhaghirathibai. It was not the contention of Respondent no.2 that there was any fraud or collusion as a result of which the daughter of Bhagirathibai was not bmpleaded as a party. If such contention would have been raised, the Appellant would have taken steps to implead the daughter of Bhagirathibai as party. This is one aspect of the matter. Another important aspect is that Bhagirathibai and her son Plantiff no.2 had admittedly sold the suit property in favour of the Respondent no.2 during the pendency of the suit. As held earlier the decree for specific performance can be passed against the Purchaser Respondent no.2 in view of Section 19(b) of the said Act of 1963. If this be the position, even accepting the case of the Original Plaintiffs, all the right, title and interest of Bhagirathibai during her lifetime stood transferred in favour of Respondent no.2. On this count also failure to implead the daughter of Bhagirathibai cannot be held to be fatal to the case of the Appellant.

15. The Judgments of both the Courts below do not show that discretion under Section 20 of the said Act of 1963 was exercised by the Courts below after considering factors which are relevant for the exercise of such discretion. Specific performance of a contract is an equitable relief and therefore consideration of equity was necessary while exercising power under section 20. In view of the findings recorded, it is very clear that the equity was in favour of the Appellant.

16. In the circumstances, the Appeal must succeed. Hence, I pass the following order.

(a) The impugned Judgments and decrees are quashed and set aside.

(b) The counter claim filed by the Appellant in Regular Civil Suit No. 52 of 1976 stands decreed with costs throughout.

(c) The Appellant is directed to deposit the balance consideration payable under the suit agreement in the Trial Court within a period of 3 months from today.

(d) If the balance consideration is deposited in the Trial Court within the stipulated time, the Respondents will execute a conveyance in respect of the suit property in favour of the Appellant.

(e) In the event the Respondents fail to execute the conveyance, the Appellant can execute the decree for specific performance by filing execution Application.

(f) If the Appellants fail to pay the balance consideration within the stipulated time, the prayer for specific performance will stand dismissed and in

such event, there will be a decree against the Respondent no.1 for payment of Rs.2300/- to the Appellant together with interest thereon at the rate of 6% per annum from 5th January, 1976 till realisation.

. C.C. expedited.

SD/-

JUDGE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE JURISDICTION

SECOND APPEAL NO. 260 OF 1988

DATE OF JUDGEMENT: 17TH AUGUST, 2004

FOR APPROVAL OF

HON'BLE SHRI. JUSTICE ABHAY S. OKA :

1. Whether Reporters of local papers may be allowed to see the judgment? -no.

2. Whether to be referred to the Reporters or not?

3. Whether the lordship wish to see the fair copy of the judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder?

5. Whether it is to be circulated to all the Civil Judges?

6. Whether the case involves an important question of law and whether the copy of the judgment should be sent to Nagpur, Aurangabad and Goa Offices?

****